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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of TARA HEATHER and
VINCE GENE WEBER.

TARA HEATHER WEBER,

Appellant,

v.

VINCE GENE WEBER,

Respondent.

F071841

(Super. Ct. No. 454811)

OPINION

APPEAL from an order of the Superior Court of Stanislaus County. Jack M. Jacobson, Judge.

Tara Heather Wood, in pro. per.; and John J. Hollenback, Jr., for Appellant.
McCormick, Barstow, Sheppard, Wayte & Carruth and Todd W. Baxter for Respondent.

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In this marital dissolution action, wife filed a postjudgment motion to divide an omitted asset pursuant to Family Code section 2556.¹ The alleged asset was the

¹ All further statutory references are to the Family Code, unless otherwise indicated.

community's right to reimbursement for contributions made to the improvement of husband's separate real property. The trial court denied the motion, finding that the claimed right to reimbursement did not constitute a community estate asset for purposes of the statute. We conclude such a right to reimbursement is an asset of the community estate, and therefore reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Judgment was entered in this marital dissolution action on July 15, 2013. The judgment was based on an agreement of the parties, reflected in an attachment to the judgment. The attachment awarded certain community property to wife and other community property to husband. It confirmed to husband as his separate property certain real property (Woodland Avenue property). Each party waived spousal support.

On May 23, 2014, wife moved (1) to set aside the judgment on the ground the waiver of spousal support was entered through mistake or duress and (2) to divide an unadjudicated asset pursuant to section 2556. The alleged unadjudicated asset was the money the community expended on improvements to husband's Woodland Avenue property; wife alleged community funds were used to purchase and install a mobilehome on the property and to develop an almond orchard, including paying mortgage payments, property taxes, insurance, and the costs of planting and maintaining the trees. Wife asserted the settlement agreement and judgment did not mention the community's right to reimbursement of those expenditures; she sought an order requiring husband to reimburse the community for its expenditures for improvement of husband's separate real property.

Husband opposed wife's motion, asserting wife voluntarily waived spousal support, wife's reimbursement claim was not an asset, as that term was used in the reimbursement statute, and, although the parties discussed the real property extensively during settlement negotiations, wife did not request reimbursement, even when asked what she wanted from the property (essentially an argument wife waived or forfeited the claim by not raising it at the time the property division agreement was reached). After a

trial of the matter and submission of posttrial briefs, the trial court issued its order denying both the motion to set aside the waiver of spousal support and the motion to divide an omitted community asset. Wife appeals from the portion of the order denying her motion to divide an omitted asset pursuant to section 2556.

DISCUSSION

I. Standard of Review

The trial court denied the motion to divide the allegedly omitted asset based on its conclusion that wife's reimbursement claim did not constitute a community estate asset subject to postjudgment division under section 2556. Determination of that issue required consideration of the meaning of the terms used in the statute and whether the type of claim being asserted by wife—for reimbursement of community contributions to improvement of husband's separate real property—constitutes a "community estate asset" as that term is used in section 2556. Since the facts concerning the nature of the claim made by wife are undisputed, and the issue presented involves interpretation of a statute and its application to those facts, our review is de novo.² (*Estate of Thomas* (2004) 124 Cal.App.4th 711, 717–718.)

II. Rules of Statutory Interpretation

"[T]he objective of statutory interpretation is to ascertain and effectuate legislative intent." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) To determine that intent, "[w]e begin with the language of the statute, giving the words their usual and ordinary meaning. [Citation.] The language must be construed 'in the context of the statute as a whole and the overall statutory scheme, and we give "significance to every word, phrase, sentence,

² We recognize that there is sharp disagreement about whether the community in fact contributed to improvement of the Woodland Avenue property and whether wife waived any claim by the community for reimbursement by failing to raise it at the time of settlement. The trial court did not reach those factual disputes, however, and they are not relevant to the issues in this appeal. As wife puts it, the trial court "assumed—demurrer-like—the truth of Ms. Weber's allegations and concluded that even if she proved what was claimed in her pleadings, there was no basis for relief under the statute."

and part of an act in pursuance of the legislative purpose.””” (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) “If the statutory terms are ambiguous, we may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] In such circumstances, we choose the construction that comports most closely with the Legislature’s apparent intent, endeavoring to promote rather than defeat the statute’s general purpose, and avoiding a construction that would lead to absurd consequences.” (*Ibid.*) If the extrinsic sources fail to resolve the ambiguity, we “use reason, practicality and common sense to ascertain what best approximates the legislative intent.” (*Busse v. United PanAm Financial Corp.* (2014) 222 Cal.App.4th 1028, 1038.)

III. Statutes and Case Law

A. Statutory definitions

Generally, in a marital dissolution proceeding, “the court shall, either in its judgment of dissolution of the marriage ..., or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally.” (§ 2550.) Wife’s motion to divide an omitted asset was based on section 2556, which provides:

“In a proceeding for dissolution of marriage, ... the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding. A party may file a postjudgment motion or order to show cause in the proceeding in order to obtain adjudication of any community estate asset or liability omitted or not adjudicated by the judgment. In these cases, the court shall equally divide the omitted or unadjudicated community estate asset or liability, unless the court finds upon good cause shown that the interests of justice require an unequal division of the asset or liability.” (§ 2556.)

The trial court determined wife’s claim for reimbursement of the community for sums spent by it to improve husband’s separate property was not a “[c]ommunity estate asset” subject to postjudgment division pursuant to this section. The Family Code

contains no definition of the term “community estate asset.” It defines “[c]ommunity estate’ [as] both community property and quasi-community property.” (§ 63.)

“‘Community property’” means “all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state.” (§§ 65, 760.) “‘Property’ includes real and personal property and any interest therein.” (§ 113.)

Dictionary definitions of the term “asset” include “an item of value owned” (<<http://www.merriam-webster.com>> [as of Sept. 14, 2016]) and “an item that is owned and has value” (Black’s Law Dict. (9th ed. 2009) p. 134, col. 1.) “Property” is defined as “something owned or possessed; *specifically*: a piece of real estate,” “the exclusive right to possess, enjoy, and dispose of a thing,” or “something to which a person or business has a legal title.” (<<http://www.merriam-webster.com>> [as of Sept. 14, 2016].)

“Personal property” is “[a]ny movable or intangible thing that is subject to ownership and not classified as real property.” (Black’s Law Dict. (9th ed. 2009) p. 1337, col. 2.) A right to reimbursement of funds expended by the community appears to fall within these definitions; it is owned by the community and has value to the community and to the spouse who does not owe the reimbursement, in that the reimbursement may be used to increase the community estate when the community is dissolved and the estate is distributed to the spouses.

As applied to the provisions of the Family Code governing disclosure of assets and liabilities, “[a]sset’ includes, but is not limited to, any real or personal property of any nature, whether tangible or intangible, and whether currently existing or contingent.” (§ 2101, subd. (a).) The Legislature declared its intent in requiring broad disclosure of assets and liabilities:

“(b) Sound public policy further favors the reduction of the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery.

“(c) In order to promote this public policy, a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage or legal separation of the parties, regardless of the characterization as community or separate, together with a disclosure of all income and expenses of the parties. Moreover, each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts.” (§ 2100.)

Thus, in the context of a proceeding for dissolution of marriage, the Legislature has demonstrated its intent that a broad definition of property and assets is to be used in determining what the parties must disclose and what the court must divide. The objective is to ensure that, at the time of trial, the parties have full and complete knowledge of all facts relevant to their assets, liability, income, and expenses. Accordingly, we must determine whether the community’s right to reimbursement of its contributions toward the improvement of one spouse’s separate property falls within this broad definition and constitutes an asset of the community, which should be taken into account in the division of the community property and may be the subject of a motion to divide an omitted asset pursuant to section 2556.

B. Case law regarding reimbursement

There is no statute recognizing the community’s interest in a spouse’s separate real property when the community has contributed to the acquisition or improvement of that property. Likewise, there is no statute providing for reimbursement of contributions the community made to the acquisition or improvement of one spouse’s separate property.

Case law has recognized that the community may have an interest in a spouse’s separate real property when the community has contributed to its acquisition. “Where community funds are used to make payments on property purchased by one of the spouses before marriage ‘the rule developed through decisions in California gives to the community a pro tanto community property interest in such property in the ratio that the

payments on the purchase price with community funds bear to the payments made with separate funds.”” (*In re Marriage of Moore* (1980) 28 Cal.3d 366, 371–372 (*Moore*).) *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426 (*Marsden*) reaffirmed this rule and set out a formula for calculating the amount of the community and separate property interests. (*Id.* at pp. 436–437.) Both cases indicated interest on a loan, taxes, and insurance are excluded from the calculation. (*Moore*, at p. 372; *Marsden*, at p. 437.)

In re Marriage of Wolfe (2001) 91 Cal.App.4th 962 extended the rule to permit reimbursement to the community for community funds used to improve one spouse’s separate property. “Absent an agreement to the contrary, the use of community funds to improve the separate property of one spouse does not alter the character of the separate property.” (*Id.* at p. 966.) However, “there is no logical basis for denying a spouse reimbursement for a community-funded improvement to the other spouse’s separate property.” (*Id.* at p. 967.) When there is no claim that the community contribution to the improvements resulted in appreciation of the value of the separate property, the spouse claiming reimbursement is at least entitled to one-half the amount expended on the improvements. (*Id.* at p. 973.)

The court in *In re Marriage of Allen* (2002) 96 Cal.App.4th 497 concluded that, under the *Moore/Marsden* rule, “[w]here community funds are used to make capital improvements to a spouse’s separate real property, the community is entitled to reimbursement or a pro tanto interest.” (*Allen*, at p. 501.) The court explained: “The *Moore/Marsden* rule is based upon the principle that where community funds contribute to the owner’s equity in separate property, the community obtains a pro tanto quasi-ownership stake in the property. For that reason, community payments made for taxes, interest, and maintenance are not subject to the rule. [Citation.] Because contributions to capital improvements also increase the property’s equity value, *Moore*’s rationale applies as well to capital improvements made to separate property.” (*Id.* at p. 502.)

The *Allen* court noted there was a statute authorizing reimbursement in the analogous situation of a spouse's separate property contributions to community property. Section 2640 provides:

“In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division.” (§ 2640, subd. (b).)

The statute defines the term “[c]ontributions to the acquisition of property” to include “payments for improvements.” (§ 2640, subd. (a).)

The predecessor of section 2640 (former Civ. Code, § 4800.2) “create[d] a substantive right of reimbursement.” (*In re Marriage of Witt* (1987) 197 Cal.App.3d 103, 107, citing *In re Marriage of Fabian* (1986) 41 Cal.3d 440.) It “creates a new property right in the contributing spouse. The Supreme Court denominated this right the ‘right to reimbursement.’ [Citation.] Not only does Civil Code section 4800.2 create this right, but it also provides that the right cannot be conveyed (‘waived’) except in writing.” (*Witt*, at p. 107.) Subsequently, the Supreme Court stated: “a contributing spouse has a vested property right in his or her right to reimbursement for separate property contributions to community property under the post-1984 law, or section 2640. [Citations.] It would be incongruous to hold such a significant property interest exists only in the original property to which the separate property contribution is made.” (*In re Marriage of Walrath* (1998) 17 Cal.4th 907, 919.) Accordingly, the court determined that, if the community property to which one spouse had made separate property contributions was subsequently sold, the separate property contributions were still reimbursable to the extent the proceeds of the sale could be traced to other community property. (*Id.* at pp. 918–920; see *In re Marriage of Carpenter* (2002) 100 Cal.App.4th

424, 427 [“Section 2640 creates a substantive right of reimbursement that can be relinquished only by an express written waiver by the contributing spouse”].)

Because of the breadth of the definitions of “assets” and “property,” as well as the Supreme Court’s recognition of the analogous right to reimbursement under section 2640 as a “property right” and a “significant property interest,” we conclude a community’s right to reimbursement of its contributions to the improvement of one spouse’s separate property constitutes a “community estate asset” as that term is used in section 2556. Accordingly, when such a right to reimbursement was omitted from or unadjudicated in the judgment in the dissolution action, the aggrieved spouse may bring a motion pursuant to section 2556 for division of that asset between the parties.

In denying wife’s motion to divide an omitted asset, the trial court seemed to distinguish a contribution of the community to the separate property of one spouse, that results in an increase in the value of the separate property and may give the community a pro tanto interest in the separate property, from a community contribution that has not been demonstrated to have resulted in an increase in the value of the separate property. The trial court treated the latter as giving rise only to a right to reimbursement rather than a pro tanto interest in the real property, and concluded that such a right does not constitute an “asset” of the community estate. Apparently, if wife had made a *Moore/Marsden* claim to a pro tanto community interest in husband’s separate real property based on a community contribution to its improvement that resulted in enhancement of the value of the real property, the trial court would have treated that claim as an asset of the community under section 2556. Because wife did not make such a claim, but claimed only a right to reimbursement, the trial court concluded there was no community asset. We believe in either case the right to reimbursement or a pro tanto interest in separate property is an item of value to the community that constitutes a community estate asset.

Further, the trial court reasoned that the debt of one spouse to the community was not like the debt of a third party to the community. The third party would have a legal obligation to repay the debt, which would be a community asset with measurable value that could be divided at the time of dissolution. The trial court believed however, that the reimbursement claim sought “repayment of money expended by the community ... that did not result in a measurable benefit to husband.” It concluded the reimbursement right was not a cognizable asset, but “one party [was] merely using an existing community asset to the other’s exclusion.”

The reimbursement right itself has value to the community, however. The community contributed funds to the improvement of the separate property; if those funds had not been used to improve the separate property, they would have remained in the community to be used for other community purposes. Further, the contribution relieved husband’s separate property estate of the expense of making those improvements. Thus, the right to reimbursement when the community does not claim an interest in the real property is measured by the amount spent on the improvements, which is the measure of the benefit to the separate property estate. The community does not share in any appreciation in value realized by the separate real property as a result of the improvements, but it is reimbursed for the amount the separate estate saved through the community’s expenditure. We conclude the community’s right to reimbursement for its contribution toward improvements made to one spouse’s separate property is an asset of the community estate.

IV. Waiver

Husband seems to contend the judgment may be affirmed on the ground wife waived any right of the community to reimbursement by failing to claim it at the time the parties negotiated their settlement agreement. He relies on *In re Marriage of Feldner* (1995) 40 Cal.App.4th 617 (*Feldner*) for the proposition that a spouse must assert any claim for reimbursement prior to entry of judgment or it is automatically waived.

In *Feldner*, the husband, William, was a construction contractor; during the marriage, he entered into a contract with the Allens for the construction of a house. (*Feldner, supra*, 40 Cal.App.4th at p. 620.) After the parties separated, the Allens claimed the construction was defective and required repair; William failed to make repairs and the Allens sued him for refusing to remedy the defects. The question was the character (community or separate) of any potential liability arising out of the lawsuit. (*Id.* at p. 619.) The court concluded the debt was incurred when the contract was made, and was therefore a community debt. (*Id.* at pp. 622–624.) William’s performance of the contract with the Allens continued after separation, however, because the Allens requested correction of the alleged defects.

The community could have been reimbursed for losses caused by the separate (i.e., postseparation) conduct of one spouse. (*Feldner, supra*, 40 Cal.App.4th at p. 625.) The court observed:

“However, just because a spouse may have a right to request reimbursement does not mean the family law court has a sua sponte duty to consider the possibility. With regard to the use of postseparation earnings to, in effect, preserve a community asset [citation], reimbursement is not automatic, but involves the consideration of such a variety of factors [citation] that the onus must necessarily be on the paying spouse to specifically request reimbursement. Further, even reimbursement under section 2640 ... requires the paying spouse to trace contributions to a separate property source. If the paying spouse simply sits back and does nothing, there will be no reimbursement.” (*Feldner, supra*, 40 Cal.App.4th at pp. 624–625, italics omitted.)

William did not request reimbursement from the community for his postseparation services completing performance of the contract, and the wife did not request reimbursement to the community for the portion of the potential liability caused by William’s failure to perform postseparation services. (*Feldner, supra*, 40 Cal.App.4th at pp. 625–626.) The trial court was under no sua sponte duty to raise these issues, so the reimbursement claims were deemed waived. (*Ibid.*)

The *Feldner* case did not involve a motion under section 2556 for division of an omitted asset. Rather, the court reviewed the judgment entered after trial and a prejudgment motion for reconsideration. (*Feldner, supra*, 40 Cal.App.4th at pp. 621–622.) Neither party raised any reimbursement issues in the trial court. (*Id.* at pp. 625–626.)

The *Feldner* court did not consider whether a claim for reimbursement of the community for amounts expended by it on improvements to the separate property of one spouse could properly be made postjudgment pursuant to section 2556. It did not determine whether a claim for reimbursement may qualify as an omitted “community estate asset,” as that term is used in section 2556. Nor did the court, in discussing section 2640 and concluding the parties waived any reimbursement rights, discuss the provision of section 2640 that the party contributing separate property “shall be reimbursed,” unless the party “has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver.” (§ 2640, subd. (b).) ““An opinion is not authority for a point not raised, considered, or resolved therein.”” (*Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1277.) *Feldner* did not discuss the issues raised in this appeal, and does not provide useful authority for determining them.

Husband asserts “there is no question that the trial court found that Tara relinquished a known right by not asserting the reimbursement claim at the time of settlement.” Because ““[w]aiver is the intentional relinquishment of a known right after full knowledge of the facts”” (*Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1189), husband appears to claim the trial court determined wife waived her right to reimbursement. Husband has not directed us to any provision in the order or the statement of decision in which such a finding of waiver was made. Regarding the reimbursement claim, the order only found “that pursuant to Family Code § 2556, [wife’s] claim for reimbursement of alleged community funds to improve

[husband's] separate property during the marriage is not a 'community estate asset' within the meaning of section 2556.”

The introductory portion of the statement of decision summarized the trial court's decision. The trial court found wife's request for reimbursement was “not considered community property to permit the Court to make a finding that the reimbursement claim is an omitted asset as defined under” section 2556. It noted the real property was confirmed to husband as his separate property and wife never claimed that the use of community funds to improve it “enhanced the value of the real property so as to create a community interest in the property.” The trial court then found “the reimbursement claim does not constitute a community property asset subject to post-judgment division.” The only discussion of waiver in the statement of decision pertained to wife's waiver of spousal support.

“‘[T]he question of waiver is one of fact, and an appellate court's function is to review a trial court's findings regarding waiver to determine whether these are supported by substantial evidence.’” (*Glaser, Weil, Fink, Jacobs & Shapiro, LLP v. Goff* (2011) 194 Cal.App.4th 423, 458.) Because the trial court did not make a factual finding of waiver, we need not address this issue further.

V. Conclusion

We conclude that a marital community's right to reimbursement for contributions it made to the improvement of one spouse's separate real property, even when the community does not claim the contributions gave rise to an interest in the separate property, is an asset of the community estate, which may be made the subject of a motion to divide an omitted asset under section 2556. We express no opinion regarding other issues raised by the motion to divide an omitted asset, including whether the community actually contributed to the improvement of husband's separate property, whether the community's right to reimbursement, if any, was “omitted or not adjudicated” as that term is used in section 2556, whether any claim for reimbursement was waived or

forfeited by wife, or whether any claim for reimbursement was implicitly disposed of in the settlement agreement and judgment. The trial court did not reach those issues, so they are not now before us for review.

DISPOSITION

The order denying wife's motion to divide an omitted asset is reversed. The matter is remanded to the trial court for a redetermination of the motion. Wife is entitled to her costs on appeal.

HILL, P.J.

WE CONCUR:

FRANSON, J.

MCCABE, J.[†]

[†] Judge of the Merced Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.